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In the

Supreme Court

of the

United States

OCTOBER TERM, 1972

No. 71-1578

JEROME J. BERGER,

Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC.,
a New York corporation,

Respondent.

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

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CBS asserts that Berger cannot argue that he has been denied findings of fact and conclusions of law on his theory of implied contract with CBS, Inc. because he did not raise the issue in a cross-appeal. This position (along with CBS' other positions) is completely without merit since Berger had no reason whatever to take a cross-appeal

after he was awarded the full relief that he had sought. In fact, the trial judge dismissed the alternative implied contract count only because recovery could not be had on both express and implied contract theories. Thus a cross-appeal on the issue of implied contract would have been subject to summary dismissal as frivolous. Cf. *United States v. Johnson*, 327 U.S. 106, 113 (1946).

The cases cited by CBS, Inc. at Page 6-7 of its Brief do not support the assertion that Petitioner was required to cross-appeal. Each case cited involved the failure of an appellee to cross-appeal on a claim separate and independent from the claim raised on appeal by the appellant. Specifically, in both *Helvering v. Pfeiffer*, 302 U.S. 247 (1937) and *LeTulle v. Scofield*, 302 U.S. 415 (1940), two distinct taxation claims were involved. Likewise, in *Penfield v. SEC*, 330 U.S. 585, 594 (1947), the Petitioner could not raise claims totally separate from those raised by the respondent in the Appeals Court when no cross-appeal had been filed. Finally, *Morley Co. v. Maryland Cas. Co.*, 300 U.S. 185, 191-192 (1937), involved the appropriateness of challenging the scope of an equitable decree in absence of a cross-appeal.

Unlike those cases, this case *does not* involve the adverse resolution of an independent claim against the Petitioner from which no cross-appeal was taken. Thus when the Court of Appeals reversed on the theory of express contract, it should also have remanded the case to the District Court on the theory of implied contract. Indeed, both *Conley v. Gibson*, 355 U.S. 41 (1957) and *Maty v. Graselli Chemical Co.*, 303 U.S. 197 (1938) — cases emphasizing the importance of allowing liberality in the drafting of pleadings—suggest that this case should be

remanded for findings of fact and conclusions of law on the theory of implied contract. Additionally, the policy underlying the provisions of Federal Rule 8(e)(2), which specifically permits alternative pleading, counsels this result. See Wright and Miller, Federal Practice and Procedure; Civil §§ 1282, 1283.

In summary, Berger has been deprived of a decision on a claim that was dismissed, after hearing, only because the District Court granted full relief on an alternative count. (R. 1689-1705). There was absolutely no reason for Petitioner to take a cross-appeal. Basic fairness requires that the decision of the lower court be modified to require at the very least a remand to the District Court for findings of fact and conclusions of law on the issue of implied contract which, although fully tried, was not ripe for decision, until reversal of Plaintiff's Judgment by the Court of Appeals.

Respectfully submitted,

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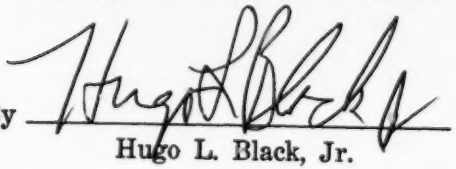
By 
Hugo L. Black, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Reply To Brief of Respondent in Opposition were furnished on the 7th day of September, 1972, to the following:

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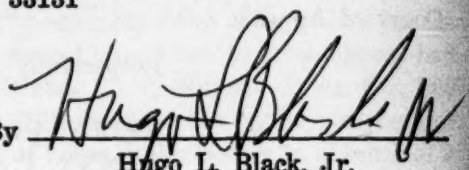
By 
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